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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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JUL - 9 1997

In the Matter of )

Rules and Policies on )

Foreign Participation in the )

U.S. Telecommunications Market )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IB Docket No. 97-142

Comments of NextWave Personal Communications Inc.

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July 9, 1997

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## SUMMARY

NextWave Personal Communications Inc. ("NextWave") commends and congratulates the Commission for the strong and consistent leadership role it played in the U.S. Government's efforts to bring the World Trade Organization (WTO) agreement on basic telecommunications to a successful conclusion. The agreement marks a decisive turning point in the globalization of the international telecommunications market and represents a remarkable global endorsement of the open, pro-competitive regulatory model pioneered by the Commission.

As the driving force behind the WTO agreement, the U.S. will set the tone for its implementation. By implementing the U.S. commitments in a manner that lives up to the full letter and spirit of the agreement, the Commission will help to ensure that the agreement lives up to its promise and potential. This requires, among other things, forthright administrative implementation of the U.S. pledge to eliminate market access restrictions on indirect foreign ownership of mobile services. Because there is no conceivable risk to competition in the U.S. telecommunications market from foreign indirect investment in "C-" and "F- block" licensees, there is no public interest reason for the Commission to subject non-controlling minority foreign investments in C- and F- block licensees by entities based in WTO countries to prior approval.<sup>1/</sup> This approach would ensure U.S. compliance with the WTO principle of national treatment.

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<sup>1/</sup> Of course, all investments in C- and F- block licensees would continue to be subject to the existing rules and policies governing transfers of control, which would apply equally to investors from the U.S. and from other WTO countries.

At a strict minimum, the Commission must (1) establish an expedited procedure for Section 310(b)(4) public interest analyses; (2) eliminate prior review of additional non-controlling minority investors in radio common carrier licensees that already have more than 25 % foreign ownership; and (3) treat all investors from WTO countries alike.

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IB Docket No. 97-142

**Comments of NextWave Personal Communications Inc.**

NextWave Personal Communications Inc. ("NextWave") hereby files its comments on the above-captioned Notice of Proposed Rulemaking ("Notice"). In the Notice, the Commission proposes to modify certain of its rules and policies in light of the international agreement on trade in basic telecommunications concluded on February 15, 1997, under the auspices of the World Trade Organization (WTO). Of particular interest and relevance to NextWave are the Commission's proposals to implement the U.S. Government's commitment to eliminate restrictions on indirect foreign investment in and ownership of U.S. common carrier radio licenses. NextWave holds 88 common carrier radio licenses to provide personal communications services (PCS) in areas covering approximately 150 million "POPs" across the country.<sup>2/</sup>

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<sup>2/</sup> NextWave conditionally has been granted seven additional PCS licenses, covering 13 million POPs. *See ACC-PCS, Inc., et al*, Memorandum Opinion and Order, File Nos. 00052CWL97 *et al* - 01440CWL9 *et al*, DA 97-1345 (rel. June 27, 1997). In total,

(continued...)

## **I. Introduction**

At the outset, NextWave wishes to commend and congratulate the Commission for the strong and consistent leadership role it played in the U.S. Government's efforts to bring the WTO agreement on basic telecommunications to a successful conclusion. The U.S. was the driving force behind the agreement, which was inspired in large measure by the remarkable success of the pro-competitive regulatory framework established in the U.S. by the Federal Communications Commission. In 1993, when the Uruguay Round of multilateral trade talks concluded, only eight (8) WTO member countries had made any commitments whatsoever regarding their basic telecommunication markets. Four years later, at the conclusion of the negotiations on basic telecommunications, the number of countries committed to opening their markets to competition, either immediately or on a "phased-in" basis, had risen to 69. To be sure, most of these countries were impelled to make these additional commitments by the accumulating weight of evidence favoring liberalization and competition in telecommunications. But it is equally true that the leading exemplar of the resulting benefits was -- and is -- the United States. By setting a pro-competitive model for the world, the Commission supported the U.S. trade negotiators' efforts to reach a comprehensive and meaningful agreement on basic telecommunications. The FCC also supported these efforts directly, through diplomatic contacts with telecommunications policymakers and regulators in

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<sup>2/</sup>(...continued)

NextWave has access to 163 million POPs, comprising all top 10 U.S. markets, 28 of the top 30 markets, and 40 of the top 50 markets.

other WTO countries, and through tireless efforts to explain the benefits of a pro-competitive regulatory framework.<sup>3/</sup> The fruit of these labors is the WTO agreement.

## **II. All Restrictions on Indirect Foreign Investment in PCS Licensees Should Be Eliminated**

One of the key benefits of the WTO agreement is that it will open most of the world's telecommunications markets to investments from other WTO member countries. By permitting private capital to flow more easily across national borders and into the telecommunications sector, the agreement will accelerate the global development of advanced wireline and wireless infrastructure and spur global competition. The result will be an ideal combination of higher quality and more efficient telecommunications services at lower costs to consumers around the world.

The lowering of barriers to foreign investment will create new opportunities for U.S. investors abroad and for foreign investors in the U.S. Both phenomena will benefit the U.S. economy and U.S. consumers. As the FCC repeatedly has stated, "foreign investment provides capital that can fuel investment in state-of-the-art infrastructure that leads to economic growth and job formation in the U.S. economy and facilitates competition among U.S. carriers at home and abroad."<sup>4/</sup>

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<sup>3/</sup> See, e.g., Reed E. Hundt, "Seven Habits of Hopefully Highly Successful Deregulatory Communications Policy People," speech before the Royal Institute of International Affairs, September 4, 1996, London, England; and "To Build One World, Only Connect," speech before the Asia Society, October 11, 1996, Hong Kong.

<sup>4/</sup> *Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 11 FCC Rcd 11354, 11358 (1996).

NextWave and the other entrepreneurial wireless carriers licensed to operate in the "C-" and "F- blocks" of the PCS spectrum are prime examples of how to the U.S. benefits from foreign investment. NextWave and the other entrepreneurial carriers are dependent on financing from a variety of sources, including foreign investment. In fact, given the current state of domestic capital markets, in which PCS auction winners are generating only limited interest in their equity, access to foreign capital is vital to the financial viability of these entrepreneurial carriers. As a result, foreign investment is playing a crucial role in achieving the benefits to the U.S. economy that the Commission sought to achieve in creating the entrepreneurs' block: the deployment of advanced digital wireless infrastructure and the injection of additional competition in the wireless services market.

In the area of wireless services, 28 countries, including the U.S. and virtually all other major markets, committed in their WTO final offers to allow up to 100% foreign ownership of wireless carriers as of January 1, 1998, and 17 other countries agreed to phase in full openness beginning in 1999.<sup>5/</sup> The U.S. made a specific, binding commitment to permit up to 100% indirect foreign ownership of "mobile services," including PCS.

Under Section 310(b)(4) of the Communications Act of 1934, as amended, the Commission may deny or revoke the grant of a common carrier radio license to an entity with greater than 25% indirect foreign ownership if the Commission deems that such denial or revocation would serve the public interest.<sup>6/</sup> The Commission currently interprets this provision as prohibiting any entity to exceed the 25% indirect foreign ownership benchmark

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<sup>5/</sup> Notice at ¶ 73. The U.S. limited its commitment to allow up to 100% foreign ownership of wireless carriers to *indirect* foreign investments.

<sup>6/</sup> 47 U.S.C. § 310(b)(4).



"absent...[an] explicit notification and an express finding by the Commission that allowing the applicant to exceed the benchmark is in the public interest..."<sup>2/</sup> As part of this Section 310(b)(4) public interest analysis, the Commission currently applies an effective competitive opportunities (ECO) test to determine whether reciprocal opportunities exist for U.S. entities to invest in the home market of a foreign entity seeking to exceed the 25% indirect ownership benchmark.

In the *Notice*, the Commission proposes to continue to require prior approval of indirect foreign investments in a U.S. radio common carrier that would raise the carrier's total indirect foreign ownership above the 25% benchmark. The Commission also asks whether additional indirect foreign investments in a carrier that already has more than 25% foreign ownership should be subject to prior Commission approval. No public interest considerations would be served by requiring prior approval of indirect foreign investments in C- and F- block PCS licensees. Moreover, there is certainly no public interest reason for the Commission to subject to prior approval additional indirect foreign investments in a carrier that already has exceeded the benchmark.

In spite of the U.S. Government's binding pledge to allow up to 100% indirect foreign ownership of U.S. mobile services, the Commission proposes to retain its current policy requiring approval of indirect foreign investments that would raise a radio common carrier's total indirect foreign ownership above the 25% benchmark. With respect to all such investments, the Commission would continue to consider public interest factors including

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<sup>2/</sup> *Fox Television Station, Inc.*, Memorandum Opinion and Order, FCC Rcd 8452, 8475 (1995), recon. denied 11 FCC Rcd 7773 (1996).

national security, law enforcement, foreign policy, or trade concerns in determining whether to grant such applications. However, with respect to investments by entities based in WTO countries, the Commission would eliminate the ECO test. Instead, it proposes to establish a "strong presumption that denial of the application would not serve the public interest."<sup>8/</sup> The Commission adds that "a party petitioning to deny an application would have to show that grant of the application would pose a very high risk to competition in the U.S. telecommunications market that could not be addressed by conditions that we could impose on the license."<sup>9/</sup>

NextWave recognizes that, as the Commission states, "some applications [to exceed the 25% benchmark] may pose a very high risk to competition."<sup>10/</sup> Where such potential risks exist, NextWave agrees that it may be necessary to continue to require prior approval by the Commission of indirect investments above 25%. However, where no such risks exist, prior approval is unnecessary and should not be required. NextWave respectfully submits that with respect to the C- and F- block PCS licenses, there is no conceivable risk to competition in the U.S. telecommunications market from foreign indirect investment, irrespective of the source of the investment. The C- and F- block entrepreneurs are new entrants competing with entrenched cellular carriers and other PCS licensees that have gained a significant head-start in the market. It will not be possible for a C- or F-block licensee to achieve market power in any market, which is the necessary prerequisite in order to harm

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<sup>8/</sup> Notice at ¶ 74.

<sup>9/</sup> *Id.* at ¶ 75.

<sup>10/</sup> *Id.*

competition. Even if such a license-holder invested unlimited funds, it could not achieve market power.

There is also no risk that a foreign carrier could leverage its market power in its home market to the detriment of competition in the U.S. PCS market, because the markets are never adjacent.<sup>11/</sup>

For the foregoing reasons, NextWave respectfully urges the Commission to conclude that indirect foreign investment above 25% in C- and F- block PCS licensees by any entity whose home market is a WTO country serves the public interest and will be subject only to a Commission notification requirement. Of course, any investment in a C- and F- block licensee that involves a transfer of control of the licensee would continue to be subject to Commission review and approval, irrespective of whether the investor is domestic or foreign. However, under NextWave's proposal, non-controlling minority foreign investments in C- and F- block licensees by entities based in WTO countries would be allowed to be made on the same basis as non-controlling minority investments by U.S.- based investors -- i.e., without Commission approval and the regulatory delays inherent in any approval process.

NextWave wishes to stress that its proposed approach is fully consistent with the WTO principle of national treatment, more so than even the Commission's proposed

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<sup>11/</sup> The only possible risk that a foreign carrier with market power in its home market could harm competition in the U.S. through ownership of a U.S. PCS licensee is with respect to international service between the U.S. and the carrier's home market. Such risks are properly addressed in the context of an application under Section 214 to serve that route, or an application to transfer an existing Section 214 authorization to serve the route. Not only is this potential risk to competition remote, it in no way warrants or justifies requiring prior approval of a greater than 25% investment by the foreign carrier in the PCS licensee.

approach.<sup>12/</sup> Effective January 1, 1998, the Commission is required to grant to the telecommunications "service suppliers" of other WTO member countries treatment identical to that it affords U.S. service suppliers.<sup>13/</sup>

Alternatively, should the Commission decide, notwithstanding the U.S. WTO commitment, to continue to require prior approval of investments that would raise a U.S. radio common carrier's indirect foreign ownership above 25%, NextWave respectfully urges the Commission to establish an expedited process and timetable for addressing such applications. NextWave recommends that the Commission adopt a process similar to the one it recently adopted for evaluating alternative settlement arrangements.<sup>14/</sup> Pursuant to Section 64.1002 of the Commission's rules, such applications are deemed granted 21 days after the date the Commission issues a public notice seeking comment on the application, unless the application is formally opposed or the Commission has informed the applicant in writing, within 21 days of the public notice, that the application may not serve the public interest and that implementation of the proposed arrangement must await formal action on the petition.<sup>15/</sup> A similar process could be adopted with respect to Section 310(b)(4) public

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<sup>12/</sup> Under the Commission's approach, a non-controlling minority foreign investment above 25% in a C- or F-block licensee would be subject to approval, but an identical investment by a U.S. entity would not.

<sup>13/</sup> See General Agreement on Trade in Services, Art. XVII.

<sup>14/</sup> *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, FCC 96-459 (rel. Dec. 3, 1996), recon. pending.

<sup>15/</sup> This approach would require that any Executive Branch Comments on a given application be submitted to the Commission expeditiously. Given the binding legal obligations to which the U.S. is subject under the WTO agreement, this would not be unreasonable. To facilitate timely Executive Branch review of Section 310(b)(4)

(continued...)

interest analyses. Licensees and prospective investors would benefit from the regulatory certainty such a timetable would provide (in addition to the proposed "strong presumption" in favor of investments from WTO countries). The additional certainty of a timetable would encourage foreign investment in U.S. wireless carriers, with all of the attendant benefits to U.S. consumers and the U.S. economy.

In the *Notice*, the Commission also asks whether it should examine "the extent of a WTO Member's commitment or its implementation of its commitment in determining whether a particular application presents competition problems that must be addressed."<sup>15/</sup> NextWave suggests that the Commission not pursue such a course. Differential treatment of service suppliers based in different WTO countries is contrary to the national treatment principle central to the WTO regime. It is clear as a matter of international trade law, and it was clear to the U.S. Government when it committed to eliminate market access limits on indirect foreign ownership of mobile services, that this commitment would bind the U.S. with respect to service suppliers from all WTO countries. The Commission may not discriminate among WTO countries with respect to their commitments.

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<sup>15/</sup>(...continued)

applications, the Commission could require applicants to serve specific agencies or officials as well.

<sup>16/</sup> *Notice* at ¶ 75.

Similarly, concerns about a particular WTO member country's fulfillment of its commitments under the basic telecommunications agreement are properly addressed through the WTO dispute resolution mechanism.<sup>17/</sup> The power to determine whether a particular country has implemented its commitments resides with the WTO, not with individual member countries. Moreover, the failure of one country to comply with its WTO obligations in no way relieves other countries of the obligations to which they are subject.

Further, the Commission inquires whether it should continue to review additional foreign investments in a common carrier radio licensee that already has more than 25 % foreign ownership, where such additional investments do no effect a transfer of control.<sup>18/</sup> Again, NextWave urges the Commission not to pursue such a course. Such investments do not raise any public interest concerns and cannot result in any harm to competition in the U.S. telecommunication markets. On the contrary, for the reasons clearly enunciated by the Commission, such foreign investments affirmatively serve the U.S. public interest and are critical to the financial well-being of the entrepreneurial wireless carriers.

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<sup>17/</sup> The dispute settlement provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex Two of the Agreement Establishing the World Trade Organization apply to the Basic Telecommunications Agreement through Article XXIII of the General Agreement on Trade in Services.

<sup>18/</sup> Notice at ¶ 75.

### **III. Conclusion**

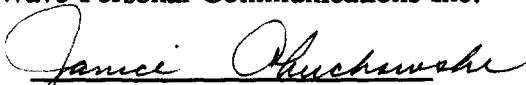
The WTO Agreement marks a decisive turning point in the globalization of the international telecommunications market. It also represents a remarkable global endorsement of the open, pro-competitive regulatory model pioneered by the Commission. January 1, 1998, will be a proud day for the Commission, as its model expands to gird the globe. But the WTO agreement is in fact a beginning rather than an end. The broad concepts to which the 69 signatories committed themselves have yet to be implemented in most countries. As the driving force behind the agreement, the U.S. will set the tone for its implementation.

By implementing the U.S. commitments in a manner that lives up to the full letter and spirit of the agreement, the Commission will help to ensure that the agreement lives up to its promise and potential. This requires, among other things, forthright administrative implementation of the U.S. pledge to eliminate market access restrictions on indirect foreign ownership of mobile services. The Commission should conclude that indirect foreign investment from WTO countries in C- and F- block PCS licensees serves the public interest and will be permitted without prior approval, subject only to the existing rules and policies governing transfers of control (which will apply equally to investors from the U.S. and from other WTO countries). At a strict minimum, the Commission must (1) establish an expedited procedure for Section 310(b)(4) public interest analyses; (2) eliminate prior review of

additional non-controlling minority investors in radio common carrier licensees that already have more than 25% foreign ownership; and (3) treat all investors from WTO countries alike.

Respectfully submitted,

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Consultants to NextWave Personal Communications Inc.

July 9, 1997



## **CERTIFICATE OF SERVICE**

I, Katina Yates hereby certify that on the 9th day of July, 1997, a true copy of the foregoing Comments of NextWave Personal Communications Inc. was hand-delivered to the following:

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